Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

LOUDON COUNTY, TENNESSEE and TIMOTHY GUIDER, individually and in his official capacity as Sheriff of Loudon County, Tennessee,

Petitioners,

v.

WANDA SOWARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEAN B. FARMER
Counsel of Record
KEITH L. EDMISTON
HODGES, DOUGHTY & CARSON
Attorneys for Petitioners
617 W. Main Street
Knoxville, Tennessee 37902
(865) 546-9611

160341

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

90PP

QUESTIONS PRESENTED

1. Whether dicta from an opinion from this Court can clearly establish that certain conduct violates the constitutional rights of a plaintiff for purposes of qualified immunity.

2. Whether subjective inquiries into a defendant's motivation for terminating an employee in a First Amendment political association case can be relied upon by a court to deny qualified immunity when the defendant's proffered reason for terminating the employee is objectively reasonable.

3. Whether political affiliation is an appropriate employment criterion for the position of jailer in a small county sheriff's department.

4. Whether under the standards for summary judgment set forth by this Court, a court can properly deny summary judgment when to create a genuine issue of material fact the nonmoving party relies solely on inadmissible evidence which cannot be put into an admissible form for trial.

5. Whether a determination as to which level of scrutiny to apply in a First Amendment intimate association/right to marry case is unnecessary at the summary judgment stage.

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Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. 1a) is reported at 203 F.3d 426 (6th Cir. 2000). The opinion of the United States District Court for the Eastern District of Tennessee (App. 29a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. 27a) was entered on February 8, 2000. The Court of Appeals entered an order (App. 62a) denying a timely petition for rehearing with suggestion for en banc review on March 24, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment, as made applicable to the states through the Fourteenth Amendment, and 42 U.S.C. § 1983.

The First Amendment provides, in pertinent part, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right

> of the people to peaceably assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment provides, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent Wanda Sowards was employed, first as a deputy and then a jailer, by petitioner Loudon County, Tennessee, from 1986 until her termination on July 18, 1995. In February 1994, respondent's husband announced that he was a candidate for the office of sheriff of Loudon County. Respondent's husband was defeated in May 1994 by petitioner Timothy Guider, the incumbent sheriff, by a substantial margin. Some fourteen (14) months later, respondent was terminated by petitioner Guider, upon the recommendation of his chief jailer, for failing to locate an outstanding mittimus on an arrestee after the sheriff had repeatedly advised all the jailers of the importance of performing that task.

The instant action was instituted by respondent on July 15, 1996, in the United States District Court for the Eastern District of Tennessee. The respondent's complaint averred that petitioner Guider terminated her for the exercise of her First Amendment rights to political affiliation and intimate association with her husband rather than for failing to locate and serve an outstanding mittimus. The respondent's cause of action was asserted under 42 U.S.C. § 1983, and the jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1343. The petitioners answered the complaint on October 18, 1996.

After initial rounds of discovery, the petitioners filed their first motion for summary judgment. The district court granted the motion to the extent that respondent did not have a constitutional right to be married to a specific individual, but denied the motion in all other respects. More specifically, the district court ruled that genuine issues of material fact

existed as to whether petitioner Guider's termination of respondent was substantially motivated by her exercise of First Amendment rights. The district court found that the record was underdeveloped on the issues of whether political affiliation is an appropriate consideration for the position of jailer and whether petitioner Guider was entitled to qualified immunity.

The petitioners further developed the record with more discovery and then filed a second motion for summary judgment, which was granted. At the same time, the respondent filed a motion to reconsider the district court's ruling that the respondent failed to state a claim for violation of her First Amendment right to intimate association. The district court ruled that the respondent failed to create a genuine issue of material fact regarding whether petitioner Guider's decision to terminate the respondent was substantially motivated by the respondent's exercise of protected conduct. The district court did not reach the issues of whether political affiliation is an appropriate consideration in the employment of a jailer or whether petitioner Guider was entitled to qualified immunity.

The respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. On February 8, 2000, the Court of Appeals issued its opinion reversing the decision of the district court, holding that (1) genuine issues of material fact existed as to whether the termination decision was substantially motivated by the respondent's exercise of protected conduct, (2) the First Amendment prevents adverse employment action motivated by the employee's marriage to a specific person, (3) political affiliation is not an appropriate employment criterion for the position of jailer in a county sheriff's department, and (4)

petitioner Guider is not entitled to qualified immunity because this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 S. Ct. 13, 111 L. Ed. 2d 52 (1990), clearly established that political affiliation is not an appropriate consideration for the employment of a jailer in a county sheriff's department.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON THE ISSUE OF QUALIFIED IMMUNITY.

A. *The Court of Appeals relied solely on dicta from this Court's decision in Rutan v. Republican Party of Illinois in holding that it was clearly established in July, 1995, that a county sheriff could not terminate a jailer on the basis of her political affiliation.*

The Court of Appeals held that "[i]t was objectively unreasonable for Guider to believe that political considerations were appropriate for the position of jailer in 1995 in light of the Supreme Court's 1990 *Rutan* decision." *Sowards v. Loudon County*, 203 F.3d 426, 440 (6th Cir. 2000) (citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79, 110 S. Ct. 2729, 2739, 111 L. Ed. 2d 52 (1990)). The Court of Appeals concluded that this Court's decision in *Rutan* clearly established that political considerations were inappropriate for the position of state prison guard. *Sowards*, 203 F.3d at 440 (citing *Rutan*, 497 U.S. at 79, 110 S. Ct. at 2739.

The sole issue presented to this Court in *Rutan* was "whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support." 497 U.S. at 65, 110 S. Ct. at 2732. This Court did not discuss whether the position of state prison guard fell within the *Elrod – Branti* exception to the general rule prohibiting patronage dismissals, because that issue was not before the Court. Justice Stevens, in his concurrence, acknowledged that the question of whether political affiliation is appropriate for the positions of the plaintiffs was not before the Court because none of the parties suggested that party affiliation was relevant to any of the positions. *Rutan*, 497 U.S. at 89 n.5, 110 S. Ct. at 2745 n.5 (Stevens, J., concurring).

In its ruling in the instant case, at best, the Court of Appeals was relying on mere dicta that the job of prison guard was a low-level position for considerations of political affiliation was not appropriate. *See Rutan*, 497 U.S. at 79, 110 S. Ct. at 2739.

In sum, the Court of Appeals' decision that *Rutan* held that political considerations are inappropriate for the position of prison guard is inconsistent with this Court's decision in *Rutan*. Moreover, *a rule that dicta from an opinion of this Court can clearly establish law for the purpose of a qualified immunity analysis is inconsistent with this Court's qualified immunity decisions*, the goal of which was to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986). It would be inconsistent with this Court's qualified immunity jurisprudence to charge a law enforcement officer with gleaning from dicta what conduct is constitutionally permissible and what conduct is forbidden.

B. ***The Court of Appeals based its qualified immunity decision on the subjective motivation of petitioner Guider rather than the objective reasonableness of Guider's conduct, in derogation of this Court's decision in Crawford-El v. Britton.***

In *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), this Court held that in cases concerning motive-based constitutional claims, a properly supported motion for summary judgment on the issue of qualified immunity "may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated." 118 S. Ct. at 1592. Rather, the nonmoving party must come forward with affirmative objective evidence that the defendant's conduct violated clearly established law. *Id.* at 1598.

In conflict with this ruling in *Crawford-El*, the Court of Appeals, after determining that it was clearly established in July 1995 that a sheriff cannot consider political affiliation in employment decisions regarding a jailer, simply concluded that "[b]ecause the law was so clearly established that [Guider] could not reasonably take political considerations into account when terminating Sowards, Guider is not entitled to qualified immunity in his individual capacity. . . ." *Sowards*, *supra*, 203 F.3d at 440. The Court of Appeals based its qualified immunity decision solely on subjective "evidence," such as testimony concerning petitioner Guider's alleged illicit motives in terminating Sowards, and was unable to cite any affirmative objective evidence tending to show that Guider had a motive for terminating Sowards other than the legitimate reason that she failed to adequately perform her jailer functions, a failure which Sowards admitted.

Petitioners put on unrebutted proof that the justification for Sowards' termination was her failure to locate and serve a mittimus on an individual who had been wanted by the state for over a year. *Sowards*, 203 F.3d at 434. Clearly established law permits a sheriff in an at-will employment state[1] to terminate an employee for failure to adequately perform her duties. *Under Crawford-El, the Court of Appeals was not allowed in its qualified immunity analysis to make subjective inquiry into whether petitioner Guider's motives were impermissible.* Instead, the Court of Appeals was required to make inquiry into whether Guider's actions were objectively reasonable in light of clearly established law. It did not undertake that analysis.

II. THIS COURT SHOULD REVIEW THE IMPORTANT QUESTION OF WHETHER POLITICAL AFFILIATION IS AN APPROPRIATE EMPLOYMENT CRITERION FOR THE POSITION OF JAILER IN A SMALL COUNTY SHERIFF'S DEPARTMENT.

In the instant case, the Court of Appeals ruled that political affiliation is not an appropriate employment consideration for the position of jailer in a small county sheriff's office. *Sowards v. Loudon County*, 203 F.3d 426, 438 (2000). Since this Court's rulings in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), there have been multiple decisions from the various Courts of Appeals attempting to define which governmental positions are constitutionally amenable to political considerations. Particularly frequent are opinions involving

1. Employees of the Sheriff in Tennessee counties are employees at will. Tenn. Code Ann. § 8-20-109.

employment decisions made by sheriffs and police chiefs. The large number of decisions illustrates the importance of clear guidance from this Court on when political affiliation is an appropriate employment criterion for deputies, jailers, and police officers.

A split of authority exists in the United States Courts of Appeals on the issue of whether political affiliation is an appropriate consideration for employment decisions concerning deputies, which the petitioners contend is analogous to the position of jailer as that position is performed in small Tennessee counties. *Compare, e.g., Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1090, 118 S. Ct. 881, 139 L. Ed. 2d 869 (1998); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) (all holding that political affiliation is appropriate for employment decisions related to deputies), *with Diruzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000); *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997) (all holding that political affiliation is not appropriate for the position of deputy). Specifically as to jailers, three Courts of Appeals in addition to the Court of Appeals in the instant case have ruled that political affiliation is not an appropriate consideration when making employment decisions involving jailers. *See Knight v. Vernon*, __F.3d __, 2000 WL 709560 (4th Cir.) (decided June 2, 2000); *Terry, supra*; *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).

Although the very few decisions involving jailers have thus far been consistent, the decisions involving deputies have not been consistent. *A uniform body of law is necessary in order for sheriffs in Tennessee and elsewhere to be able*

to make adequate decisions about employees when taking office. The inability of sheriffs to terminate or refuse to hire politically hostile employees can have disastrous consequences not only for the sheriff but for his constituency as well. There are many possible adverse effects to the sheriff and his constituency when a jailer is affiliated with the sheriff's political opposition.

With regard to certain low-level government positions, political hostility between an elected official and the employee filling the low-level position does not have the potential for substantial adverse consequences. For example, if a grass-mower or snow-shoveler for the Department of Transportation is politically hostile to the Secretary of the Department and for that reason does not faithfully execute his duties, then the consequences, uncut grass and unshoveled snow, can be alleviated by terminating that individual's employment and hiring someone else who can get the grass mowed and the snow shoveled. The adverse consequences are not substantial.

On the other hand, the situation is completely different with regard to a jailer in a small county. A politically hostile jailer who does not perform her duties faithfully and in accordance with the sitting sheriff's directives can create substantial adverse consequences. Jailers in Loudon County, Tennessee, and elsewhere have the means and opportunity to violate the civil rights of the inmates housed in the jail and of the voting public. A "mistake" made by a jailer in Tennessee not only can have disastrous political consequences at the polls but also can and does create civil and sometimes criminal liability for the sheriff. *See* Tenn. Code Ann. § 44-4-101 (sheriff liable for the actions of his jailers). Quite obviously, the failure of a jailer to perform

his or her duties because of political hostility towards the sheriff must be avoided.

It could be said that "political firings" are not the least restrictive means to address the government's interest in effective law enforcement because the sheriff can terminate the jailer or deputy once he learns that the jailer or deputy is not in fact effectively performing his or her job. If the political hostility does not effect the deputy's or jailer's performance, then in retrospect the sheriff would not have had good cause to terminate the deputy or jailer when the sheriff took office. This argument probably works well for the grass-mower and snow-shoveler used as an example hereinabove, but it is not workable with regard to deputies and jailers. When a jailer or deputy makes a "mistake," the result is not infrequently the violation of an innocent person's civil rights or even a serious injury or death. At that point, it is too late to make personnel adjustments to combat hostility. Accordingly, *an employment decision made as soon as the sheriff takes office is the only guaranteed method for preventing the substantial and irreparable adverse results of a deputy's or jailer's exercise of political hostility towards the new sheriff.*

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND WITH PREVIOUS DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REGARDING THE STANDARD FOR SUMMARY JUDGMENT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. *The Court of Appeals relied solely on inadmissible evidence to defeat the petitioners' properly supported motion for summary judgment, in contravention of precedent from this Court and the United States Court of Appeals for the Sixth Circuit.*

The decision of the United States Court of Appeals relied solely on immaterial evidence and inadmissible evidence which could not be put into an admissible form for trial to create a genuine issue of material fact on the important issue of whether petitioner Guider's termination of respondent Sowards was substantially motivated by Sowards' political affiliation, in direct conflict with precedent from this Court, *e.g.*, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and with prior decisions of the Sixth Circuit, *e.g.*, *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185 (6th Cir. 1997); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991); *Monks v. General Elec. Co.*, 919 F.2d 1189 (6th Cir. 1990). *It is important for this Court to clarify whether inadmissible evidence can be used to defeat a properly supported motion for summary judgment.*

In *Matsushita*, *supra*, this Court noted that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " 475 U.S. at 587, 106 S. Ct. at 1356 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)). Similarly, in *Anderson*, *supra*, this Court noted that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." 477 U.S. at 249, 106 S. Ct. at 2511. This Court further explained in *Anderson* that "[i]f the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." 477 U.S. at 249-50, 106 S. Ct. at 2511 (citing *Dombrowski v. Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L. Ed. 2d 577 (1967) (*per curiam*), and *Cities Service*, *supra*, 391 U.S. at 290, 88 S. Ct. at 1592). It is firmly established in American jurisprudence that hearsay evidence and evidence which is speculative is not admissible and, therefore, is "not significantly probative," *Anderson*, *supra*, and cannot lead a rational trier of fact to find for the non-moving party," *Matsushita*, *supra*. Accordingly, under the precedents of this Court described hereinabove, such evidence is not sufficient to defeat a properly supported motion for summary judgment.

The United States Court of Appeals for the Sixth Circuit has specifically held that evidence which is inadmissible and cannot be put into an admissible form for trial cannot be relied upon to defeat a properly supported motion for summary judgment. *E.g.*, *U.S. Structures*, *supra*, 130 F.3d at 1189; *Monks v. General Elec. Co.*, *supra*, 919 F.2d at 1192. More specifically, the Court of Appeals has ruled that hearsay evidence and irrelevant evidence must be disregarded in determining the merits of a summary judgment motion. *Dole*, *supra*, 942 F.2d at 968-69.

In its opinion in the instant case, the Court of Appeals relied solely upon speculation by petitioner Guider on what he might have done under a hypothetical set of facts not in evidence to create a genuine issue of material fact on the issue of whether Guider's decision to terminate respondent Sowards was substantially motivated by Sowards' political affiliation. *Sowards v. Loudon County*, 203 F.3d 426, 434 (6th Cir. 2000). The hypothetical question asked of Guider was, "[i]f Wanda Sowards had been one of [your] staunchest supporters in the last election, would [you] have looked into the basis for Sergeant Bridges' recommendation of termination rather than more or less accepting it[?]" *Id.* Guider's response was, "I might have." *Id.* This question simply required Guider to *speculate* as to what decision he *might* have made had the hypothetical facts, rather than the true and undisputed facts, occurred. Quite obviously, the question and answer are pure speculation and inadmissible in any form at trial. Accordingly, the question and answer are not significantly probative of the question whether Guider's decision to terminate Sowards was in fact motivated by Sowards' political affiliation.

The only other facts discussed by the Court of Appeals to support its reversal of the district court's summary judgment concerned Sowards' testimony as to how other employees of the sheriff's department, not Guider, treated her after her husband announced his candidacy. *Id.* at 434. These facts are not material because they are not relevant to the issue of *Guider's* motivation for terminating Sowards. There was simply no evidence at all in the record upon which a rational juror could return a verdict for Sowards.

In sum, *the reliance by the Court of Appeals on inadmissible evidence to defeat the petitioners' properly*

supported motion for summary judgment contravenes the summary judgment standards described in the decisions of this Court and the prior decisions of the Court of Appeals. The petitioners raised the issue of whether the subject evidence was admissible, but the Court of Appeals declined to discuss the admissibility of the evidence. The district court specifically ruled that the evidence was inadmissible. *The petitioners respectfully submit that if the summary judgment procedure is going to continue to be a useful and efficient defense to meritless claims, this Court must clarify whether inadmissible evidence can defeat a properly supported motion for summary judgment.*

B. *The Court of Appeals ruled that questions regarding which level of scrutiny to apply in a First Amendment case are not necessary at the summary judgment stage, in contravention of this Court's holding in Anderson v. Liberty Lobby, Inc. and applicable decisions from the United States Court of Appeals for the Sixth Circuit.*

In *Anderson v. Liberty Lobby, Inc., supra*, this Court held "that the inquiry involved in ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." 477 U.S. at 252, 106 S. Ct. at 2512. Logically flowing from this holding is a requirement that a court necessarily determine what level of scrutiny to apply to conduct allegedly infringing on the constitutional rights of the plaintiff when a defendant files a motion for summary judgment arguing that the justification for his conduct outweighed the interests of the plaintiff in the exercise of her rights as a matter of law. In the instant case, the Court of Appeals ruled that "it is not necessary to engage in [a level of scrutiny] analysis at the summary

judgment stage if the plaintiff alleges she was terminated on the basis of a protected relationship. *Sowards*, *supra*, 203 F.3d at 433.

The petitioners submit that this ruling of the Court of Appeals is inconsistent with the precedents of this Court on the standards for summary judgment, and more particularly the holding of *Anderson*, *supra*. Moreover, this ruling directly conflicts with the Court of Appeals' holding in *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), a decision on an *appeal from a summary judgment* which spent nine (9) reporter pages discussing which level of scrutiny to apply in an associational right to marry case.

This Court's First Amendment jurisprudence in "right to marry" and "right to intimate association" cases illustrates that the conduct of governmental actors is subject to differing levels of scrutiny depending upon whether the conduct is a direct and substantial infringement on the right to marry. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682, 54 L. Ed. 2d 618 (1978); *compare Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) (strict scrutiny) *with Califano v. Jobst*, 434 U.S. 47, 98 S. Ct. 95, 54 L. Ed. 2d 228 (1977) (rational basis scrutiny). The petitioners argued in the Court of Appeals that Guider's conduct in terminating Sowards needed only to satisfy a rational basis test. *Sowards*, *supra*, 203 F.3d at 433. The Court of Appeals, however, held that the respondent's mere allegation that she was terminated on the basis of a protected relationship "met her burden at this juncture of establishing that she was engaged in the protected conduct of intimate association under the First Amendment." *Id.*

The Court of Appeals' problem in the instant case is that it misread its own decision in *Montgomery*, *supra*. The *Montgomery* court noted that "[i]f the *only* motivation for a public official taking some adverse employment action against a public employee is the employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." 101 F.3d at 1127 (emphasis in original). In other words, if the sole motivation for the adverse employment action is the exercise of protected conduct, then indeed an inquiry into which level of scrutiny to apply is unnecessary. In the instant case, however, the petitioners produced evidence that the termination was motivated by the respondent's failure to discharge her duties. Even at the summary judgment level, the Court of Appeals should have taken the next step and analyzed whether petitioner Guider's justifications for terminating the respondent were rational in light of the interest sought to be protected.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

DEAN B. FARMER
Counsel of Record
KEITH L. EDMISTON
HODGES, DOUGHTY & CARSON
Attorneys for Petitioners
617 W. Main Street
Knoxville, Tennessee 37902
(865) 546-9611

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED FEBRUARY 8, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-6768

WANDA SOWARDS,

Plaintiff-Appellant,

v.

LOUDON COUNTY, TENNESSEE and TIMOTHY GUIDER, individually and in his official capacity as Sheriff of Loudon County, Tennessee,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 96-00659 — James H. Jarvis, District Judge.

Argued: October 26, 1999

Decided and Filed: February 8, 2000

Before: JONES, MOORE, and GILMAN, Circuit Judges.

* * *

Appendix A

OPINION

KAREN NELSON MOORE, Circuit Judge. Wanda Sowards filed suit under 42 U.S.C. § 1983 against Loudon County and the Sheriff of Loudon County Timothy Guider, in his individual and official capacities, claiming that she was terminated from her position as a jailer at the Loudon County Sheriff's Department in retaliation for exercising her First Amendment rights of political and intimate association. Sowards's husband, William Sowards, had run unsuccessfully for sheriff against Guider in early 1994. Guider terminated Sowards's employment in July 1995 allegedly because she missed an outstanding warrant on a person brought into the jail. The district court granted Loudon County and Guider's motion for summary judgment and dismissed the case because it found no genuine issue of material fact existed to show Sowards's constitutionally protected activity substantially motivated Guider to terminate her employment. Sowards appeals the dismissal of her case. Loudon County and Guider respond that even if Sowards's First Amendment rights were violated, political affiliation is a proper consideration for the position of a jailer under the *Elrod/Branti* exception. In addition, they claim that Guider is entitled to qualified immunity in his individual capacity.

We conclude that Sowards has established that she suffered an adverse action while engaged in constitutionally protected activity. A genuine issue of material fact exists whether Guider's action was substantially motivated by this activity. Because political considerations are not appropriate for the position of a jailer, we hold that the *Elrod/Branti*

exception to the First Amendment rule protecting public employees against politically-based dismissals does not apply in this case. Finally, Guider is not entitled to qualified immunity in his individual capacity. Therefore, we **REVERSE** and **REMAND** for further proceedings in Sowards's retaliation suit against Loudon County and Guider.

I. FACTS AND PROCEDURE

Wanda Sowards began working at the Loudon County Sheriff's Department ("LCSD") as a road deputy in 1986 and then transferred to the position of a jailer in 1989. In early 1994, her husband, William Sowards, announced that he would be running as a Republican for the position of Sheriff of Loudon County against incumbent Timothy Guider, also a Republican. Sowards's husband lost to Guider in the Republican primary election in May 1994.

Sowards claims that after her husband announced his candidacy, her work environment changed significantly. She asserts that her supervisors ostracized her, disciplined her more harshly than her co-workers, changed her day shift to a split shift, and reduced her overtime opportunities. Finally, on July 19, 1995, she was terminated allegedly because she had missed an outstanding warrant.

On June 28, 1995, Edward D. Ricker was arrested on a DUI charge and brought to the LCSD jail. Sowards was working on that date and was responsible for checking for any outstanding warrants on persons brought into the facility. She claims that she did not find an outstanding warrant on

Ricker because she had understood his name to be "Wicker," resulting in Ricker later being released without the warrant being served. Sowards's supervisor, Chief Jailer Joe Bridges, recommended terminating her employment because the warrant involved a serious burglary charge that had been outstanding for over one year. He did not consider the fact that she may have misunderstood the person's name to be an important consideration in his recommendation. After receiving Bridges's recommendation, Guider did not conduct any further investigation. A few days later he agreed to terminate Sowards's employment.

Sowards filed a complaint against Loudon County and Guider, in his individual and official capacities, pursuant to 42 U.S.C. § 1983, claiming that she was terminated in retaliation for the exercise of her First Amendment rights of political and intimate association. Loudon County and Guider filed a motion for summary judgment, arguing that no genuine issue of material fact exists regarding Sowards's retaliation claim. They also claimed that political considerations are appropriate for the position of a jailer under the *Elrod/Branti* exception and that Guider is entitled to qualified immunity in his individual capacity. The district court granted Loudon County and Guider's motion in part and dismissed Sowards's claim based on the right of intimate association. The district court denied their motion with respect to Sowards's claim based on the right of political association and found insufficient evidence upon which to decide whether political considerations are appropriate for the position of a jailer and to evaluate the defense of qualified immunity. After more discovery, Loudon County and Guider filed a second motion for summary judgment based on the

same arguments. Sowards filed a response to this motion and a motion to reconsider the district court's dismissal of her right of intimate association claim. The district court granted Sowards's motion to reconsider her right of intimate association claim but then granted Loudon County and Guider's motion for summary judgment dismissing all of Sowards's claims. It reasoned that no rational juror could find Guider's decision to terminate Sowards was substantially motivated by the exercise of her First Amendment rights of political and intimate association. Sowards filed a timely notice of appeal of the district court's decision.

II. ANALYSIS

A. Sowards's First Amendment Retaliation Claim

A district court's decision to grant summary judgment is reviewed de novo. *See General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1097 (6th Cir. 1994). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). We must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the plaintiff. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). We view inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. *See General Elec. Co.*, 29 F.3d at 1097-98.

Appendix A

Sowards claims that she was terminated from her position as a jailer at the LCSD for exercising her First Amendment rights of political and intimate association in violation of 42 U.S.C. § 1983. In order to establish retaliation for engaging in constitutionally protected activity, a plaintiff must prove the following elements: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two — that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). In brief, this analysis focuses on whether the adverse employment action was motivated in substantial part by the plaintiff's constitutionally protected activity. *See Mattox v. City of Forest Park*, 183 F.3d 515, 520-21 (6th Cir. 1999). If the plaintiff meets her burden, the burden then shifts to the defendants to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. *See Kreuzer v. Brown*, 128 F.3d 359, 363 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1802 (1998); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).[1]

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1. In *Whitaker v. Wallace*, 170 F.3d 541, 544 (6th Cir. 1999), a panel in this circuit applied the burden shifting analysis used in Title VII employment discrimination cases to a First Amendment retaliation claim. The Supreme Court, however, has expressly held that in a First Amendment retaliation case, once a plaintiff shows that her constitutionally protected conduct was a substantial factor in an adverse employment decision, the burden of persuasion shifts

(Cont'd)

(Cont'd)
to the defendant to "show[ ] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (Stating that to prevail in a First Amendment retaliation claim, "an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination. If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct."). We have followed this analysis in opinions in this circuit. *See Barrett v. Harrington*, 130 F.3d 246, 262 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Ratliff v. Wellington Exempted Village Sch. Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir. 1987); *see also Kreuzer*, 128 F.3d 359, 365 n.1 (6th Cir. 1997) (Moore, J., dissenting) (concurring in the majority opinion's statement of the law and noting that unlike the employment discrimination cases brought under Title VII, once a plaintiff establishes sufficient evidence that the protected conduct was a substantial or motivating factor behind the adverse employment action, the burden of persuasion shifts to the defendants to prove that the same decision would have been made in the absence of the protected conduct), *cert. denied*, 118 S. Ct. 1802 (1998); *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 67 (1st Cir. 1993) (noting that unlike the burden shifting analysis performed under Title VII cases, in a First Amendment political retaliation claim, "once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant has produced enough evidence to establish that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons"). When a later decision from this court conflicts with its prior decisions, the earlier cases control. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 765 (6th Cir. 1999). Therefore, the Supreme Court's *Mt. Healthy* analysis, as applied by this circuit in *Barrett* and *Ratliff*, *inter alia*, governs First Amendment retaliation claims in this circuit.

Appendix A

1. Protected Conduct

To prove the first element of retaliation, Sowards argues that she was exercising her rights of both political and intimate association protected by the First Amendment. The right of political association is a well established right under the First Amendment for " 'political belief and association constitute the core of those activities protected by the First Amendment.' " *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (quoting *Elrod v. Burns*, 427 U.S. 347, 356 (1976)). Support of a political candidate falls within the scope of the right of political association. *See Elrod*, 427 U.S. at 356-57. Therefore, Sowards was exercising her constitutionally protected right of political association by supporting her husband's campaign for the office of Sheriff of Loudon County.

Sowards also claims that she was retaliated against because of her exercise of her First Amendment right of intimate association with her husband. In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), the Supreme Court stated that one type of constitutionally protected freedom of association is the right "to enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." The Supreme Court reasoned that the formation and preservation of certain types of "highly personal relationships" is necessary to secure individual liberty and suggested that marriage is such a relationship that must be protected from unwarranted state interference. *See id.* at 618-19. Although the Supreme Court

did not explain whether this right stems from the freedom of association under the First Amendment or the fundamental right to marry under the Due Process Clause of the Fourteenth Amendment, we have analyzed the right of intimate association under the First Amendment. *See Adkins v. Board of Educ.*, 982 F.2d 952, 955-56 (6th Cir. 1993).

In *Adkins*, a high school secretary claimed that the superintendent of the school board refused to recommend continuing her employment in retaliation for her association with her husband, who was the principal of the high school. We concluded that the plaintiff secretary had made a prima facie case of a constitutional violation because evidence showed that her freedom to form " 'certain intimate human relationships' " was implicated in the superintendent's decision not to recommend rehiring her. *See* 982 F.2d at 956 (quoting *Roberts*, 468 U.S. at 617). We explained, "it is not necessary that the governmental act require the abandonment or dissolution of a marriage relationship as the price for retaining public employment. The right of association is violated if the action constitutes an undue intrusion by the state into the marriage relationship." *Id.* (quotation omitted).[2]

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2. We note that the *Adkins* decision merges the analysis of whether a plaintiff was engaged in constitutionally protected conduct with the analysis of whether an adverse action violated the plaintiff's constitutional rights, which have been separated into two steps in more recent decisions. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc); *Mattox v. City of Forest Park*, 183 F.3d 515, 520-21 (6th Cir. 1999); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). However, it is clear that under the *Adkins* decision, the right of intimate association is protected only where the plaintiff alleges an undue interference with a protected intimate relationship.

Accordingly, Sowards has the right to associate intimately with her husband, and her marriage relationship is protected from undue intrusion by the state. Sowards claims that she lost her job because of her protected marital relationship, and that this constitutes undue intrusion by the state in that relationship. See *Adkins*, 982 F.2d at 956.

Defendants respond with several arguments. First, they mistakenly assert that Sowards's right to marry was not violated because she is still married to her husband and that she does not have a fundamental right to marry a specific person. With respect to the First Amendment's right of intimate association, the state action need not cause "abandonment or dissolution" of the marriage to constitute an undue intrusion. *See Adkins*, 982 F.2d at 956. In addition, defendants' citations to cases involving the fundamental right to marry under the Due Process Clause of the Fourteenth Amendment are not applicable to Sowards's right of intimate association claim under the First Amendment. Defendants also argue that Guider's actions need only satisfy a rational basis test. However, it is not necessary to engage in such an analysis at the summary judgment stage if the plaintiff alleges that she was terminated on the basis of a protected relationship. *See Montgomery v. Carr*, 101 F.3d 1117, 1127-28 (6th Cir. 1996). Sowards claims that Guider dismissed her because of her protected relationship with her husband, which could constitute an undue interference in that relationship under *Adkins*. Therefore, we conclude that Sowards has met her burden at this juncture of establishing that she was engaged in the protected conduct of intimate association under the First Amendment.

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2. Adverse Action

Sowards then must prove that she suffered an adverse action by Loudon County and Guider that caused her to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in her constitutionally protected conduct. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Sowards was dismissed from her position as a jailer at the LCSD. A dismissal qualifies as an adverse employment action for the purposes of a retaliation claim. *See id.* at 396 (pointing to "discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote" as examples of adverse actions in the employment context).

3. Requisite Causal Connection

Finally, Sowards has the burden of proving that her termination was substantially motivated by the exercise of her constitutional rights. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Sowards worked as a jailer at the LCSD for several years and never had any problems until her husband announced that he was running for the position of Loudon County Sheriff. She then noticed an abrupt change in her work environment. She asserts that her supervisors ostracized her, changed her day shift to a split shift, disciplined her more harshly than her co-workers, told her she was being watched by the sheriff's office, and reduced her overtime opportunities. On July 19, 1995, Guider terminated Sowards from her position as a jailer allegedly in response to an incident that occurred on June 28, 1995, in which Sowards failed to serve an outstanding warrant for

burglary on a person who had been brought to jail on a DUI charge. In Sowards's dismissal letter, Guider explained that he was following Chief Jailer Bridges's recommendation to terminate her employment because it was her responsibility to check for outstanding warrants and because of the serious nature of the burglary charge which had been outstanding for over a year. In his deposition, Guider denied that he took into account the fact that Sowards was married to William Sowards when terminating her. However, when asked "[i]f Wanda Sowards had been one of [his] staunchest supporters in the last election would [he] have looked into the basis for Sergeant Bridges' recommendation of termination rather than just more or less accepting it," Guider replied, "I might have." J.A. at 140.

Sowards has presented sufficient evidence upon which a reasonable juror could conclude that Guider's decision to terminate her employment was substantially motivated by her protected First Amendment associational rights. Guider admitted that he might have treated her termination case differently if she had been one of his political supporters. Although defendants respond that Guider also asserted that he did not take Sowards's association with her husband or his political campaign into account in deciding to terminate her employment, Guider made conflicting statements regarding his treatment of Sowards's case. Thus, a genuine issue of material fact exists regarding his true motivation for terminating her employment.

Moreover, other evidence also supports Sowards's claim that Guider's decision to terminate her was substantially motivated by her protected conduct. Prior to her termination,

Sowards had never been disciplined for missing a warrant. Guider admitted that Sowards had been a dependable employee and had never been involved in any serious disciplinary action. Bridges acknowledged that her job performance over the years was a positive factor on her behalf. However, Bridges stated that he decided to recommend termination because the warrant Sowards missed had been outstanding for a long time and involved a serious crime. Even though Sowards explained that she had looked for the wrong name, Bridges stated that she could have looked up the records to find the correct name, and he did not treat her mistake more leniently because a misunderstanding was involved. Bridges also admitted that other LCSD officers had missed mittimuses,[3] but had never been fired for that omission despite their obligation to check for both outstanding warrants and mittimuses, which are located in the same box. Because there is evidence that she was treated differently than other officers who had made similar mistakes and that she was terminated based on only one mistake, Sowards has provided sufficient evidence that her association with her husband substantially motivated Guider to terminate her.

Defendants have not presented sufficient evidence that Guider would have terminated Sowards on the basis of this one mistake in the absence of her protected association. They

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3. Like a warrant, a mittimus is a written order from a court or magistrate "directed to the sheriff or other officer, commanding him to convey to the prison the person named therein, and to the jailer, commanding him to receive and safely keep such person until he shall be delivered by due course of law." BLACK'S LAW DICTIONARY 1002 (6th ed. 1990).

argue that Guider did not know that Sowards had supported her husband in his political campaign for sheriff and thus could not have made any decisions on this basis. *See Hall v. Tollett*, 128 F.3d 418, 426-27 (6th Cir. 1997) (dismissing plaintiffs' political retaliation claims because of lack of evidence that a newly elected sheriff had any knowledge of which candidate plaintiffs had actually supported in the election). Guider claims that Sowards told him she was planning on supporting his candidacy rather than her husband's. Sowards denies making this statement. Furthermore, Guider admitted "[b]ut in my mind, you know, I felt confident that she would support her husband." J.A. at 146. Unlike the sheriff in *Hall*, Guider actually spoke with Sowards and "felt confident" that she would support her husband's campaign. Defendants also argue that Guider could not have known of Sowards's political affiliation because Sowards admitted she was not politically active at work and had not given money to any campaigns. A rational juror could conclude, however, that Guider knew Sowards had supported her husband on the basis of Guider's deposition statement describing his conversation with her and his conclusion that she would support her husband.

Viewing the evidence in the light most favorable to Sowards, we conclude that a genuine issue of material fact exists whether Sowards's termination was substantially motivated by her protected associational freedoms. Therefore, the district court erred in granting defendants' motion for summary judgment.

B. Elrod/Branti Exception

Loudon County and Guider argue that even if Sowards is able to show that she was fired because of her political association with her husband, political affiliation is an appropriate consideration for the employment or termination of a jailer. Whether political affiliation is an appropriate consideration for a government position is a question of law. *See Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir.), *cert. denied*, 118 S. Ct. 298 (1997). The "issue on summary judgment is whether Defendants have established that no genuine factual issue exists as to whether political affiliation may appropriately be considered with respect to the position in question." *Feeney v. Shipley*, 164 F.3d 311, 314 (6th Cir. 1999) (quotation omitted).

In *Elrod v. Burns*, 427 U.S. 347, 367 (1976), the Supreme Court established the principle that certain public employees in confidential and policymaking positions may be dismissed on the basis of their political affiliation without violating the First Amendment. The Supreme Court reaffirmed this holding in *Branti v. Finkel*, 445 U.S. 507, 518 (1980), stating that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." In this analysis, we "must look beyond the mere job title and examine the actual duties of the specific position." *Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). It is "the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office" that must be analyzed. *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990). In

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McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996), we identified four categories of positions which should fall under the *Elrod-Branti* exception with reasonable certainty:

> Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
>
> Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
>
> Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors;
>
> Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

If a particular position falls into one of these categories, then political affiliation is an appropriate consideration for that position and a public employee may be dismissed without violating the First Amendment. *See Hall*, 128 F.3d at 424. A government position is not required, however, to fall neatly within one of the categories to be entitled to the *Elrod-Branti* exception. *See Feeney*, 164 F.3d at 318.

Under Tennessee law, "[t]he sheriff of the county . . . may appoint a jailer, for whose acts the sheriff is civilly responsible." TENN. CODE ANN. § 41-4-101 (1997). Jailers are charged with the following responsibilities: to receive and safely keep convicts on their way to the state or federal penitentiary, to file and keep safe under the sheriff's direction the mittimus or process by which a prisoner is committed or discharged from jail, to determine within their discretion what type of precautions to take for guarding against escape and to prevent the importation of drugs, to provide support, to furnish adequate food and bedding, to enforce cleanliness in the jails, to convey letters from prisoners to their counsel and others, and to admit persons having business with the prisoner. *See* TENN. CODE ANN. §§ 41-4-104, 41-4-105, 41-4-106, 41-4-108, 41-4-109, 41-4-111, 41-4-114 (1997).

Defendants argue that these statutory duties require discretion in the day-to-day operation of the jail and have serious consequences with respect to the safety of the prisoners and the public. Chief Jailer Bridges stated that "As a jailer, Sowards was required to exercise her discretion and judgment in determining whether the inmates needed medical attention, whether any of the inmates was suicidal, and whether any disruptions were likely to arise between the

inmates." J.A. at 247 (Bridges Aff.). She also was "responsible for exercising [her] discretion and judgment with regard to the admission of visitors and any special requests or requirements by the inmates or their relatives or agents . . . . [and also] for dispensing medication, food, necessary living supplies, and mail." J.A. at 247. In addition, she was responsible for "preventing contraband from entering or exiting the facility and for making sure inmates remain secure in the facility." J.A. at 247. Bridges also stated that at certain times only two jailers are on duty, without any direct supervision at the jail facility, and that he relies on them to carry out their duties to avoid any danger to the inmates or the visiting public. Defendants argue that the position of a jailer involves especially serious consequences because a jailer could violate the civil rights of the prisoners and the visiting public, and the sheriff is civilly liable for the acts of a jailer. Therefore, they argue that a jailer's actions could have serious political and legal implications for the sheriff.

Sowards agrees that her responsibilities "included securing the inmates located in the Loudon County jail, looking after their safety, providing medications and other medical necessities for their needs." J.A. at 91. She asserts that her position did not, however, "involve any managerial responsibilities, any policy making or involvement in political or policy decisionmaking. [She] simply followed orders and directives" given by Chief Jailer Bridges and Sheriff Guider. J.A. at 91. Guider admitted that Sowards's position as a jailer did not involve any policymaking for the day-to-day operation of the prison facility and that she was not in a confidential relationship with him regarding how to

run the facility. Nor did he believe that political loyalty was required for Sowards to carry out her responsibilities. In addition, Bridges stated that Sowards did not make policy for the jail or the sheriff's department and that she would carry out the duties and orders that he or the sheriff would give to her. He also agreed that this position did not require political loyalty to the sheriff.

Loudon County and Guider claim that the position of a jailer could fall under *McCloud* category two or three. With respect to category two, they assert that Guider and Bridges delegated much of their discretionary authority regarding the day-to-day operation of the jail to jailers. The position of a jailer does not fall under *McCloud* category two, however, because this category involves delegations of policymaking authority. "Category two also exists to capture those who would otherwise be category one policymakers, except that the federal government, state, county, or municipality has chosen for whatever reason not to set out the responsibilities of such a position in a statute, ordinance, or regulation." *McCloud*, 97 F.3d at 1557 n.31. Both Guider and Bridges admitted that jailers do not participate in any type of policymaking for the prison and are simply required to follow directives. Therefore, the position of a jailer does not fall under *McCloud* category two.

In addition, defendants argue that a jailer falls under category three because a jailer acts as a conduit for communication between prisoners and the sheriff. The *McCloud* category three position involves employees who control the lines of communication to category one or category two position-holders. *See id.* at 1557 n.32. This

category is concerned with this type of employee's access to confidential, political information transmitted to the policymaker, which requires political loyalty. *See id.* (citing *Faughender v. City of North Olmsted*, 927 F.2d 909, 914 (6th Cir. 1991) (holding that mayor's secretary had access to confidential and political material because she controlled the lines of communication to the mayor)). Both Guider and Bridges stated that Sowards did not have any access to any confidential or political information. Therefore, category three does not apply in this case.

Although none of the *McCloud* categories are applicable, defendants also cite to several cases in other circuits that have held upheld the use of political considerations for positions allegedly similar to a jailer at the LCSD. The primary case they rely on, however, is inapposite. In *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998), the Fourth Circuit held that a sheriff could base his decision to fire or hire deputy sheriffs on political considerations. It reasoned that under North Carolina law the deputy sheriffs "play a special role in implementing the sheriff's policies and goals" because they are sworn to carry out law enforcement on behalf of the sheriff and make independent decisions which may ultimately affect law enforcement policies. *Jenkins*, 119 F.3d at 1162. In addition, the sheriff relies on the deputies to foster public confidence in law enforcement and is civilly liable for their actions. *See id.* at 1162-63. Based on this evidence, the court concluded that deputy sheriffs are the "alter ego" of the sheriff in North Carolina. *See id.* at 1164. Defendants argue that, like the deputy sheriffs in *Jenkins*, jailers at the LCSD in fact establish policy with the individual decisions

they make and the sheriff is civilly liable for their actions. Although jailers have some decisionmaking authority with respect to providing for the needs and safety of the prisoners, they are supervised by and must follow the directives of Guider and Bridges. They have no role in the policymaking process of the prison. While Guider is civilly liable for jailers' actions, this is not sufficient to characterize them as his "alter-ego."

A jailer's statutory duties under Tennessee law generally involve providing for the needs and safety of the jail's inmates, such as providing food, bedding, and support for the inmates, taking precautions to ensure their safety, and arranging communications between inmates and the public. These duties essentially mirror the duties of a prison guard. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990), the Supreme Court determined that political considerations are not appropriate for employment decisions regarding the position of a prison guard. Defendants argue that LCSD jailers are not like prison guards because they work in a small facility where each individual decision has serious consequences, unlike a large prison facility with several guards on duty and multiple levels of supervision. This argument is not persuasive because, like a jailer, a prison guard's individual decisions and actions also could have serious consequences for the inmates and the visiting public. Therefore, based on the *Rutan* decision, it is not appropriate to take political considerations into account for the position of a jailer at the LCSD, and the *Elrod/Branti* exception is not applicable in this case.

C. Qualified Immunity

Defendants aiso argue that Guider is entitled to qualified immunity to the extent that he was sued in his individual capacity. The district court determined that sufficient evidence did not exist upon which to make a decision on this defense. If a plaintiff states a claim under 42 U.S.C. § 1983, then this court reviews de novo a district court's decision regarding qualified immunity. *See Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997).

The doctrine of qualified immunity provides that "government officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). We have adopted a two-step test for determining whether a government official is entitled to qualified immunity. *See Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996). Under the first step, we must examine "whether plaintiff has shown a violation of a constitutionally protected right." *Id.* "If the answer is yes, then the second step is to determine whether the right is so 'clearly established' that a 'reasonable official would understand that what he is doing violates that right.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

As discussed in Part II.A *supra*, Sowards has provided sufficient evidence from which a reasonable juror could conclude that Guider terminated her because of her association with her husband in violation of her First

Amendment right of intimate association. In *Adkins v. Board of Education*, 982 F.2d 952, 956 (6th Cir. 1993), we determined that a high school secretary's right of intimate association, protecting her from being fired because of her relationship with her husband, is a clearly established right in this circuit. We cited to two Supreme Court decisions, establishing the right in 1984 and 1987, and concluded it was objectively reasonable to expect the public official to respect that right in 1988. *See Adkins*, 982 F.2d at 956 (citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)). Because Sowards's right of intimate association was clearly established by July 19, 1995, it was objectively reasonable for Guider to understand that he was violating that right when he terminated her. Therefore, he is not entitled to a defense of qualified immunity on this claim.

With respect to Sowards's political association claim, a genuine issue of material fact exists as to whether Guider violated this First Amendment right in terminating her employment. The right of political association with a particular campaign is a clearly established right. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990). Defendants argue, however, that the law governing which public positions fall under the *Elrod/Branti* exception was not so clearly established in 1995 for Guider to understand that he was violating Sowards's right of political association. We have noted that a Supreme Court or Sixth Circuit decision specifically holding that a certain position falls under this exception is not necessary for the law to be clearly established under the doctrine of qualified immunity. *See McCloud v. Testa*, 97 F.3d 1536, 1556 (6th Cir. 1996). Neither the

Supreme Court nor the Sixth Circuit has evaluated whether a jailer at the LCSD, or a jailer possessing the same duties as those mandated by Tennessee law, falls under the *Elrod/Branti* exception.[4]

Defendants argue that our decision in *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992), shows the "murkiness" of the law with respect to positions in a county sheriff's department. In that decision, we concluded that as of 1988, no clearly established law prohibited the consideration of political affiliation for the position of deputy sheriff in Tennessee. *See Cagle*, 957 F.2d at 1349 (pointing out a circuit split regarding whether this position is subject to the *Elrod/Branti* exception).[5] In another decision, we determined that the state of the law regarding patronage dismissals of deputy

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4. We emphasize again that the actual duties of a particular position, and not its title, govern the *Elrod/Branti* analysis. *See Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). Because the duties of a jailer may vary from state to state, it is important to examine the applicable state and local law when deciding whether political considerations may be used in employment decisions concerning a jailer. *See id.* at 427-29 (engaging in a case-by-case analysis of state and local law to determine whether the position of deputy sheriff falls within the *Elrod/Branti* exception). Therefore, in deciding whether the law was clearly established for the purpose of qualified immunity, we look for decisions that involve positions with the same or similar statutory duties.

5. Sowards correctly notes that the *Cagle* court did not recognize or address the Supreme Court's conclusion in *Elrod* that political considerations may not be used for the employment of the position of chief deputy sheriff. *See Elrod v. Burns*, 427 U.S. 347, 350-51, 372-73, 374-75 (1976).

sheriffs in Tennessee had not been clarified as of September 1, 1994, and therefore we granted qualified immunity to a sheriff who had terminated the employment of his deputy sheriffs for political reasons. *See Hall v. Tollett*, 128 F.3d 418, 429-30 (6th Cir. 1997). Defendants seem to argue that because the law was unclear as to whether political affiliation was an appropriate consideration for the position of deputy sheriff in Tennessee, it also was unclear regarding the position of a jailer at the LCSD. A deputy sheriff, however, has different duties than a jailer under Tennessee law. For example, the deputy sheriffs in *Hall* were responsible for patrolling the roads of the county and responding to emergency situations. *See id.* at 429. Therefore, the fact that the law may have been unclear regarding the applicability of the *Elrod/Branti* exception to the position of deputy sheriff in 1995 is not dispositive in this case.

As discussed in Part II.B *supra*, however, the position of a jailer is analogous to the position of a prison guard, and the Supreme Court concluded that political considerations are inappropriate for the employment decisions concerning a prison guard in 1990. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990). It was objectively unreasonable for Guider to believe that political considerations were appropriate for the position of a jailer in 1995 in light of the Supreme Court's 1990 *Rutan* decision. Because the law was so clearly established that he could not reasonably take political considerations into account when terminating Sowards, Guider is not entitled to qualified immunity in his individual capacity for Sowards's political association claim.

III. CONCLUSION

For the reasons stated above, we **REVERSE** the district court's grant of summary judgment to defendants and **REMAND** for further proceedings on Sowards's claim of retaliation based on her rights of political and intimate association under the First Amendment.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6768

WANDA SOWARDS,

Plaintiff – Appellant,

v.

LOUDON COUNTY, TENNESSEE and TIMOTHY GUIDER, individually and in his official capacity as Sheriff of Loudon County, Tennessee,

Defendants – Appellees.

Before: JONES, MOORE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court as to the grant of summary judgment to defendants is REVERSED and the case

is REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE DATED AND FILED NOVEMBER 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-659

WANDA L. SOWARDS,

Plaintiff

v.

LOUDON COUNTY, TENNESSEE
and TIMOTHY GUIDER,

Defendants

MEMORANDUM OPINION

This civil rights action was brought pursuant to 42 U.S.C. § 1983. Plaintiff Wanda Sowards, following her termination as a jail guard at the Loudon County Jail, brought this action claiming that her First Amendment rights of political association and familial association were violated when Sheriff Tim Guider terminated her allegedly because she supported her husband, William Sowards, in the 1994 Republican primary for the Sheriff of Loudon County. In a memorandum opinion dated June 9, 1998, this court granted defendants' motion for summary judgment on the familial

association claim, but denied it with respect to the political association claim. Defendants have now renewed their motion for summary judgment [Court File #38]. Plaintiff has also requested the court to reconsider the dismissal of plaintiff's familial association claim [Court File #43]. In light of the case of *Adkins v. Board of Education*, 982 F.2d 952 (6th Cir. 1993), recognizing that a familial association claim may exist under similar circumstances, plaintiff's motion to reconsider that claim [Court File #43] will be granted. However, because I conclude that no question of material fact remains with regard to whether either plaintiff's political association or association with her husband were a substantial factor in her termination, defendants' motion for summary [Court File #38] will be granted and this action will be dismissed.

I.

Factual Background

The following factual allegations are considered in the light most favorable to the plaintiff. Plaintiff Wanda Sowards was initially employed at the Loudon County Sheriff's Department by Sheriff Guider's predecessor, Joe Simms, as a road deputy in 1986. Simms was a Democrat, and defendant Guider is a Republican. In September 1989, plaintiff transferred within the Sheriff's Department to the job of jailer. As a jailer, plaintiff was responsible for securing prisoners in the jail under the direction and supervision of jail administrator Joe Bridges, a Guider appointee.

Mrs. Sowards is married to William Sowards. William Sowards was formerly an employee of the Loudon County

Sheriff's Department until he was terminated in 1993 for allegedly sleeping on the job. In approximately February 1994, William Sowards announced that he would be a candidate against Sheriff Guider in the Republican primary for the office of Sheriff.

Plaintiff testified in her deposition that she was neutral in the primary. The Sheriff's Department's regulations did not permit her to openly campaign for her husband, and she did not do so. It is uncontradicted that she did no campaigning for her husband either inside or outside of the Sheriff's Department. She did not have a bumper sticker on her car, nor did she wear a campaign button supporting any candidate. She also did not ask anyone at the Sheriff's Department to vote for her husband. She had no conversations or communications with Sheriff Guider regarding her husband's candidacy. Plaintiff admitted in her deposition that she was never asked by her supervisors, Sergeant Bridges or Chief Deputy Akins, nor Sheriff Guider about her political affiliation or whether she would support her husband in the primary. Mrs. Sowards never told anyone employed at the jail, including Chief Jailer Bridges, Chief Deputy Akins, or Sheriff Guider, that she was going to support her husband as a candidate in the Republican primary. She further admitted she never heard Sheriff Guider, Sergeant Bridges, or Chief Deputy Akins ask any employee who they supported politically in any type of local election. Sergeant Bridges testified that he did not recall any discussion of how the election would affect Mrs. Sowards, nor did he observe any different treatment of Mrs. Sowards during the time when her husband was a candidate for the Republican nomination for Sheriff. Sheriff Guider testified that he had no knowledge

of whether or not Mrs. Sowards supported him in the primary election. In fact, he testified that she had indicated to him later that she had supported him in the election. Sheriff Guider did testify that he had assumed that Mrs. Sowards would support her husband.

Plaintiff claims that it was well known in the community and at the Sheriff's Department that she would vote for her husband and support his candidacy against Sheriff Guider. She claims that when it became known within the Sheriff's Department that her husband would oppose the Sheriff in the primary election, it became a topic of significant discussion within the Sheriff's Office and the community, and plaintiff noticed an abrupt change in her working conditions and work environment. She claims that after her husband's candidacy became known, her supervisor, Bridges, and other supervisors and officers ignored her, sought to ostracize her in the workplace and at social events, disciplined her differently and more stringently than similarly situated officers, cut back on the number of side references formerly available to her, switched her from the day shift to the "graveyard" shift, and generally attempted to make her work environment hostile. Plaintiff further claims that after her husband announced his candidacy, she was called into Bridges' office and accused of "bad mouthing the Sheriff in the Sheriff's Department."

The Republican primary was held on May 3, 1994, and Sheriff Guider defeated Mr. Sowards. In June 1994, William Sowards became permanently disabled as the result of a heart attack, and for that reason would apparently not be a future candidate for Sheriff.

Appendix B

On June 28, 1995, over 13 months after Mrs. Sowards' husband had lost the Republican primary and at least 16 months after Mr. Sowards announced his candidacy for Sheriff, plaintiff failed to locate and serve an outstanding criminal warrant on an individual named Edward D. Ricker, who had been arrested on a DUI charge. Plaintiff explained that she understood the name to be "Wicker" and she checked the "W" files rather than the "R" files. When she was notified of the error, plaintiff admitted to the mistake and did not try to cover it up.

Bridges received notice from Officer Jonathan Bryant about the failure to serve a warrant on Eddie Ricker, who had a *capias* on a $10,000 bond in Criminal Court. Bridges checked and confirmed that Mrs. Sowards was working in the control room and had the responsibility for checking the warrants at the time Ricker was booked into the jail. Bridges believed that he also talked to Mrs. Sowards about why she missed the warrant. Based upon his review of the matter, Bridges dictated a memo recommending to the Sheriff that Sowards be terminated. Bridges purportedly made this recommendation because Eddie Ricker had been actively sought for a significant period of time, a number of hours had been spent looking for him, a bond was in place, and when in custody, Ricker had not been served with the warrant. After writing the memo, Sergeant Bridges talked with Sheriff Guider with regard to the incident and why he recommended Mrs. Sowards' termination. Bridges allegedly felt that Mrs. Sowards' situation was a serious incident and warranted termination.

Plaintiff claims that it is undisputed that warrants and mittimuses had been similarly missed by other jailers through

the years with no extraordinary discipline imposed. However, there is no evidence of what these incidents were nor that they were as serious as the Ricker incident, in that an individual sought by the Sheriff's Department to the extent that Eddie Ricker had been had been released back onto the street because of a jailer's failure to locate a mittimus. Plaintiff also admitted that it had been discussed at meetings and in memos that the jailers were to be careful in locating mittimuses and warrants.

The Sheriff testified in his deposition that the decision to terminate Mrs. Sowards was based on the recommendation of Bridges and his desire that the offense not occur again. Sheriff Guider testified that he considered whether to terminate the plaintiff over the missed mittimus for two days. During the deposition of Sheriff Guider, the following exchange took place regarding Guider's reasons for terminating the plaintiff:

> Q. [BY MR. ALLIMAN]: Ok. Well, did you take into account in making your decision that Mrs. Sowards was the wife of William Sowards, who had run against you as Sheriff of Loudon County?
>
> A. [BY TIMOTHY GUIDER]: No.
>
> Q. If Mrs. Sowards had been, say, one of your staunchest supporters in the last election campaign, would you have taken the same action — or would you have — and Sergeant Bridges had brought to you the same information and the

same recommendation, would you have treated the case any differently than what you did?

[MR. FARMER]: Object to the form of the question.

Q. Go ahead.

A. I can't answer that.

Q. Well, I take it then what that means is you might have?

A. I'm just saying that, you know — at that particular time I had no hard feelings against Wanda. I had no hard feelings against Bill, you know, for that matter. The election was over. It had been over 14 months, well into the second year of the second term. That had no bearing. It was over.

Q. My question is, if Wanda Sowards in the last election had been one of your staunchest supporters, would you have called her in to talk to her about the situation to see what her side of the story was before making your decision?

[MR. FARMER]: Continuing objection.

A. You know I can't answer that. Possibly.

Q. Ok. If Wanda Sowards had been one of your staunchest supporters in the last election,

would you have maybe investigated to see what the basis for the recommendation was? Not the fact that the warrant was missed, but the basis for the recommendation?

A. Repeat the question please.

Q. Sure. If Wanda Sowards had been one of your staunchest supporters in the last election, would you have looked into the basis for Sergeant Bridges' recommendation of termination rather than more or less accepting it?

A. Like I said before, I think, you know — I put a great deal of trust in Sergeant Bridges and what he does. I can't say for sure I would have or wouldn't have. It just depends on —

Q. You might have?

A. I might have.

Q. All right. Well, let me say this, and then I want to ask you a question about it. It seems to me that termination for someone in Mrs. Sowards' position for the offense that she is charged with seems a little bit strong. But you apparently don't feel that way; is that correct?

A. Yes, I considered that — you know, I tried to weigh that out . . .

Appendix B

Plaintiff claims that, without any investigation or discussion, the Sheriff terminated plaintiff by letter dated July 19, 1995, even though plaintiff had been a "dependable," "competent" employee, and a "good" jailer with a number of years of experience in the department. She claims that she had never before had a significant disciplinary action taken against her. Plaintiff claims that the defendants even violated their own progressive disciplinary policy by the manner in which they terminated her.

II.

Summary Judgment Standards

Pursuant to Rule 56, summary judgment shall be rendered when requested if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. It is the burden of the party seeking summary judgment to show the court that, under uncontradicted facts, the moving party is entitled to judgment as a matter of law. Summary judgment is intended to provide a quick, inexpensive means of resolving issues as to which there is no dispute regarding the material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In assessing the validity of a summary judgment motion, the court views the pleadings, depositions, answers to interrogatories, admissions, and competent affidavits in a light most favorable to the opponent of the motion. However, an opponent to a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth through

competent and material evidence specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element of that party's case, and on which the party will bear the burden of proof at trial. *Catrett*, 411 U.S. at 322.

III.

Plaintiff's First Amendment Claims

When a public employee alleges that her employer took adverse action against her in retaliation for her exercise of her First Amendment rights, the following analytical approach is applied:

> (1) the threshold question is whether the plaintiff's conduct deserves constitutional protection;
>
> (2) if the court finds that an employee's conduct was protected by the First Amendment, the finder of fact must determine whether the action was taken because she engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision;

> (3) once the employee meets this burden, the burden shifts to the employer to prove that the action the employee is complaining about would have taken place absent the protected conduct.

Ratliff v. Wellington Board of Education, 820 F.2d 792, 795 (6th Cir. 1987). After considering all of the evidence presented, including both direct and circumstantial evidence, I am of the opinion that the finder of fact could not reasonably find by a preponderance of the evidence that Mrs. Sowards' protected conduct was a "substantial factor" in Sheriff Guider's decision to terminate her. I reach this conclusion for several reasons.

First, it was well over a year after Mr. Sowards announced his candidacy and was defeated by Sheriff Guider that Sheriff Guider took the adverse employment action. To find in favor of the plaintiff, the jury would have to infer that Sheriff Guider waited for over a year for a pretext to terminate the plaintiff. Second, it is undisputed that plaintiff never campaigned for her husband either in or out of the office, nor told anyone that she intended to support her husband in the election. Sheriff Guider even testified in his deposition that plaintiff later told him that she had supported him [Guider] in the election. Third, the defendants demonstrated a legitimate reason for the plaintiff's termination, the failure to find the mittimus on Mr. Ricker. Although plaintiff testified that others had missed mittimuses before without serious punishment, there was no evidence presented that these prior events involved a situation as serious as that of Ricker. It is also undisputed that at least once previously a meeting had been held regarding missing

mittimuses and warrants, and at least once a memorandum had been sent to the jail employees regarding the same subject. Fourth, it is undisputed that the Sheriff was the decision-maker who made the decision regarding plaintiff's termination. There is no evidence in the record that he did anything or said anything to indicate that he made his decision to terminate the plaintiff because of her support of her husband. There is no evidence that he talked to any employee or questioned any employee about who they were supporting in the election. He said nothing to the plaintiff about the election or her husband at any time between the election and the termination. Nor is there any evidence in the record that the Sheriff mentioned anything about the election or plaintiff's husband between the time that Mr. Sowards announced his candidacy and the plaintiff's termination. Fifth, it is undisputed that the decision-maker, Sheriff Guider, relied on the recommendation of his assistant, Joseph Bridges, in terminating the plaintiff. It is undisputed that the Sheriff relied on Bridges to supervise the day-to-day operation of the jail.

Plaintiff has raised a number of pieces of circumstantial evidence to support her conclusion that Sheriff Guider terminated her because of her support of her husband in the primary. These claims bear examination.

Plaintiff contends that it was "common knowledge" that plaintiff would be supporting her husband in the election. Testimony on what was "common knowledge" would be inadmissible hearsay at trial.

Plaintiff contends that she heard statements from supervisors cautioning her that "upstairs was watching her"

and that her supervisor Bridges chastised her for "badmouthing the Sheriff and the Sheriff's Department." However, there is absolutely no evidence that these statements in any way came from the decision-maker, Sheriff Guider.

Plaintiff complains that her work schedule was changed after her husband announced his candidacy. However, proof in the record showed that her shift was changed to a split shift before her husband announced his candidacy, and she was ultimately changed to a later shift because of a complaint from a state jail inspector that there was not a female guard present at the jail at all times. Plaintiff also complained that she was not given enough overtime hours, but presented no evidence to indicate that she got any less overtime than any other employee.

The strongest piece of evidence plaintiff has to support her claim is Sheriff Guider's admission at his deposition that he "might have" treated the situation differently had the plaintiff been one of his staunchest supporters. I do not believe that the jury could reasonably interpret that statement as an admission by the Sheriff that he terminated the plaintiff because she supported her husband in the primary. Rather, given the context in which the testimony was given, it appears to be simply honest speculation by Sheriff Guider regarding a set of facts that did not exist. It remains that the plaintiff missed finding a mittimus with regard to a serious offender who was in custody and, as a result, the offender was permitted to go free. It is undisputed that the Sheriff's Department considered this a serious problem. The Sheriff was warranted in terminating the plaintiff over this incident.

All in all, this is an extremely close case, but, considering the circumstantial and direct evidence in the light most favorable to the plaintiff, I do not believe that a reasonable jury could find by a preponderance of the evidence that plaintiff's support of her husband in the Republican primary was a substantial factor in Sheriff Guider's decision to terminate her over a year later. The link between the two events is simply too tenuous.

IV.

Conclusion

In light of the foregoing, plaintiff's motion to reconsider the familial association claim [Court File #43] will be granted, and that claim has been reconsidered. However, defendant's second motion for summary judgment [Court File #38] will be granted with respect to the political association and familial association claims, and this action will be dismissed. Accordingly, it is unnecessary to address further questions raised by the defendants regarding the *Branti* exception and qualified immunity.

Order accordingly.

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-659

WANDA L. SOWARDS,

Plaintiff

v.

LOUDON COUNTY, *et al.*,

Defendants

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that plaintiff's motion to reconsider [Court File #43] is GRANTED, and the familial association claim has been reconsidered. It is further ORDERED that defendants' second motion for summary judgment [Court File #38] is GRANTED with respect to both the political and familial association claims, and this action is DISMISSED.

ENTER:

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE DATED AND FILED JUNE 9, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-659

WANDA L. SOWARDS,

Plaintiff

v.

LOUDON COUNTY, *et al.*,

Defendants

MEMORANDUM OPINION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff claims that her rights of political association protected under the First Amendment and right of familial association protected under the First and Fourteenth Amendments were violated when she was terminated by the defendants from her position as a jailer for Loudon County. Plaintiff claims that she was terminated because her husband ran against defendant Guider in the Loudon County Sheriff's election and lost. Both defendants have filed a motion for summary judgment [Court File #13]. For the reasons that follow, the motion will be granted in part and denied in part.

Appendix C

I.

Factual Background

Plaintiff Wanda Sowards was initially employed at Loudon County by Sheriff Guider's predecessor, Joe Sims, as a road deputy in 1986. Sims was a Democrat and defendant Guider is a Republican. In September 1989, plaintiff transferred within the Sheriff's Department to the job of jailer. As a jailer, plaintiff was responsible for securing prisoners in the jail under the direction and supervision of jail administrator Joe Bridges, a Guider appointee.

Plaintiff claims that the jailer position was a non-confidential, non-policymaking position which did not require political loyalty as essential to the discharge of its responsibilities. There is little development in the record of the actual job duties and responsibilities of the jailer position.

While plaintiff was employed as a jailer, her husband William Sowards announced that he would run for and did in fact run for the office of Loudon County Sheriff against incumbent Tim Guider in the Republican primary on May 3, 1994. Plaintiff's husband decided to run against Guider in January 1993. Plaintiff claims that immediately after her husband decided to oppose Mr. Guider, his decision became well known within the county and was the subject of much community discussion beginning in approximately February 1993.

The Sheriff's Department regulations did not permit plaintiff to openly campaign for her husband and she did not

do so. However, she claims that it was well known in the community and at the Sheriff's Department that the plaintiff would vote for her husband and supported his candidacy against Sheriff Guider. She claims that when it became known within the Sheriff's Department that her husband would oppose the sheriff in the primary election, it became a topic of significant discussion within the Sheriff's Office and the community, and plaintiff noticed an abrupt change in her working conditions and work environment. She claims that after her husband's candidacy became known, her supervisor Bridges and other supervisors and officers ignored the plaintiff, sought to ostracize her in her workplace and at social events, disciplined her differently and more stringently than similarly situated officers, cut back on the number of side job references formerly available to her, switched her from the day shift to the "graveyard shift", and generally attempted to make her work environment hostile.

Plaintiff claims that after her husband announced his candidacy, she was called into Bridges' office and accused of "bad mouthing the Sheriff in the Sheriff's Department."

Sheriff Guider was eventually reelected as Sheriff of Loudon County. It is undisputed that on June 28, 1995, plaintiff failed to locate and serve an outstanding criminal warrant on an individual named Edward D. Ricker, who had been arrested on a DUI charge. Plaintiff explained that she understood the name to be "Wicker," and she checked the "W" files rather than the "R" files. When she was notified of the error, plaintiff admitted to the mistake and did not try to cover it up.

Appendix C

When Jail Administrator Bridges discovered the error, he notified the Sheriff and recommended that plaintiff be terminated. Plaintiff claims that without any investigation or discussion, the Sheriff terminated plaintiff by letter dated July 19, 1995, even though plaintiff had been a "dependable," "competent" employee, and a "good" jailer with a number of years of experience in the department. She claims that she had never had a significant disciplinary action taken against her before, and that no similarly situated jailer had ever been disciplined before for such conduct. Plaintiff claims that it is undisputed that warrants and mittimuses had been similarly missed by other jailers through the years with no extraordinary discipline imposed. Sheriff Guider admitted that if plaintiff had been one of his "staunchest supporters," he "might have" handled the case differently and not terminated her. Plaintiff claims that the defendants even violated their own progressive discipline policy in the manner that they terminated her.

The Sheriff testified in his deposition that he was aware when he made the termination decision that "it would be improper to terminate an employee in (plaintiff's) position for political reasons" or for familial association reasons. Plaintiff was the only employee who did not support the Sheriff's primary reelection and he "assume[d]" plaintiff would "support her husband in his endeavor." Further, plaintiff claims that when she applied for unemployment subsequent to her termination, defendants supplied false information to the Department of Employment Security regarding her termination.

Appendix C

II.

Summary Judgment Standards

Pursuant to Rule 56, summary judgment shall be rendered when requested if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. It is the burden of the party seeking summary judgment to show the court that, under uncontradicted facts, the moving party is entitled to judgment as a matter of law. Summary judgment is intended to provide a quick, inexpensive means of resolving issues as to which there is no dispute regarding the material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In assessing the validity of a summary judgment motion, the court views the pleadings, depositions, answers to interrogatories, admissions, and competent affidavits in a light most favorable to the opponent of the motion. However, an opponent to a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth through competent and material evidence specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element of that party's case, and on which the party will bear the burden of proof at trial. *Catrett*, 411 U.S. at 322.

Appendix C

III.

Plaintiff's Familial Association Claim

One of plaintiff's complaints is that the true motivation and reason for her termination was "because of her relationship to her husband." Plaintiff claims that she has a right of familial association which is protected under the First and Fourteenth Amendments and that the defendants violated this right by terminating her.

Decisions of the United States Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted government interference. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Zablocki v. Redhial*, 434 U.S. 374, 384-85 (1978).

The United States Court of Appeals for the Sixth Circuit recognized this right in *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985), finding that a school board and superintendent that denied re-employment to a non-tenured teacher because of her pending divorce violated her constitutional protective rights of association and privacy. While the outer limits of this privacy right have not been filled out by the Court, it is clear that among the decisions that an individual may make

without unjustified government interference are personal decisions "relating to marriage." *Loving v. Virginia*, 388 U.S. 1, 2 (1967). These would include such things as one's status as married or unmarried. There is no authority for the proposition that the Constitution protects one's choice of who to marry. *See State Division of Human Rights, ex rel Howarth v. Spencerport*, 78 App.Div.2d 50, 434 N.Y.S.2d 52 (1980) (state discrimination statute protecting marital status not violated by employer who fired employee because of animosity towards employee's spouse).

I am of the opinion that plaintiff's claim that she was terminated because her husband ran against the sheriff does not state a claim that her rights of familial association under the First and Fourteenth Amendment were violated.

IV.

Plaintiff's Political Association Claim

Plaintiff also raises a political association claim in that she claims that she was terminated because of her support of her husband in the primary. When a public employee alleges that her employer took adverse action against her in retaliation for her exercise of her First Amendment rights, the following analytical approach is applied:

> (1) The threshold question is whether the plaintiff's conduct deserves constitutional protection.
>
> (2) If the court finds that an employee's conduct was protected by the First Amendment,

> the finder of fact must determine whether the action taken because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision.
>
> (3) Once the employee meets this burden, the burden shifts to the employer to prove that the action the employee is complaining about would have taken place absent the protected conduct.

Ratliff v. Wellington Board of Education, 820 F.2d 792, 795 (6th Cir. 1987). I am of the opinion that plaintiff's conduct in supporting her husband in the election is deserving of constitutional protection. Sheriff Guider admitted that he assumed plaintiff would be supporting her husband in the election.

The question then becomes whether her associational conduct was a "substantial factor" in the termination decision. A question of material fact remains to be determined with respect to whether her conduct was a "substantial factor." Plaintiff has come forward with evidence that she was treated differently by her supervisor and others before her husband announced his candidacy than she was treated afterward. Although defendants point out that plaintiff admitted to "missing the warrant," which was the proffered reason for her termination, Sheriff Guider admitted that she might have been treated differently if she had strongly supported him in the election.

Appendix C

V.

The Branti Exception

In *Elrod v. Burns*, 427 U.S. 347 (1976), the United States Supreme Court held that a governmental unit violated the First Amendment by installing a traditional patronage system of government employment, wherein every government employee covered by Civil Service could be fired for strictly political reasons. The opinion for the plurality stated that politically-motivated firings violate the First Amendment by restraining the freedom of the fired employee to hold whatever political beliefs he desires, and to others to advance those beliefs. *Elrod*, 427 U.S. at 355-60. The decision in *Elrod* was further clarified in *Branti v. Finkel*, 445 U.S. 507 (1980). There, the Court reaffirmed the holdings of the *Elrod* plurality that patronage dismissal violated the First Amendment. However, *Branti* reformulated the scope of permissible patronage. The *Branti* court held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the United States Court of Appeals for the Sixth Circuit developed four categories with which to analyze employment positions in an effort to bring some certainty as to whether or not a position would fall within the *Branti* exception:

> *Category One:* positions specifically named in relevant federal, state, county or municipal law

> to which discretionary authority with respect to the enforcement of that law or the carrying out of some policy of political concern is granted;
>
> *Category Two:* positions to which a significant portion of the total discretionary authority available to Category One position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by Category One positions in other jurisdictions;
>
> *Category Three:* confidential advisors who spend a significant portion of their time on the job advising Category One or Two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to Category One positions, Category Two positions, or confidential advisors;
>
> *Category Four:* positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different government agencies.

McCloud, 97 F.3d at 1557. In determining whether a particular position falls into the *Branti* exception, the focus must be on the inherent functions of the position. *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909, 913 (6th Cir.

1991). This question cannot be answered on the record as it now exists. The court must ask whether the plaintiff had supervisory duties or carried out any discretionary authority which might require political affiliation to be a pre-requisite to her job, or whether she carried out only ministerial functions. The inherent nature of the position of jailer is not apparent. Only if it became apparent that plaintiff's position fell within the *Branti* exception would summary judgment on this issue be appropriate.

VI.

Whether Plaintiff Can Show a "Policy" or "Custom" of the County that Caused Her Termination

Relying on *Board of County Commissioners v. Joe Brown*, __ U.S. __, 117 S.Ct. 1382 (1997), the defendant county contends that a single act by Sheriff Guider, such as terminating the plaintiff, cannot show a "policy" or "custom" of the county which caused an injury to the plaintiff, and that it must be the result of a policy or custom of the county for plaintiff to have a claim against the county under 42 U.S.C. § 1983. In *Bryan County*, plaintiff brought an excessive force claim which alleged that plaintiff was injured because of a sheriff's improper hiring decision. Municipal liability in such a case could only be permitted upon a showing of "deliberate indifference" by "proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 643. The court went on to explain that the same analysis did not apply where a municipality's "decision maker has intentionally deprived a plaintiff of a federally-protected right" because such action "necessarily

establishes municipal liability". *Id.* at 640. The court stated that liability attaches where the fault and causation are obvious, *i.e.*, "proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury." *Id.* at 640.

In *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994), an assistant fire chief complained of an "isolated" incident where he had been constructively discharged in violation of the First Amendment. The court noted:

> The City argues that it is not liable under *Monell* because Meyers was not discharged pursuant to a formal City "policy." The City states, as though it is dispositive, that "[t]here is no evidence of any policy or custom of disciplining municipal employees for exercising their right of free speech. There is no evidence that any final policy-making official ever promulgated a policy of disciplining City employees for exercising their rights of free speech." Petitioner's brief at 17. No municipal official in his right mind would advocate such a general policy. The City is not accused of routinely disciplining employees for exercising First Amendment rights or of having an officially promulgated policy to that effect. Its highest officials, the Safety Director, the City Manager and the Civil Service Commissioner — acted together to discipline John Meyers for exercising his constitutional rights in this one case.

Appendix C

A requirement that a municipality's wrongful actions be a "policy" is not meant to distinguish isolated incidents from general rules of conduct promulgated by City officials. It is meant to distinguish those injuries for which "the government as an entity is responsible under § 1983," *Monell* at 436, from those injuries for which the government should be held accountable. "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479-80.

The City of Cincinnati's argument is that even if it did violate Meyers' First Amendment rights, it did not do so pursuant to a general rule disfavoring free speech. In *Pembaur*, the Supreme Court addressed and rejected the same argument, holding that "it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances." *Id.* at 480. The City's contention that Meyers' constructive discharge was an isolated incident does not, therefore, save the City from liability. If the decision to punish him for exercising his constitutional rights was made by the "government's authorized decision-makers," the City is responsible.

Id., 1117-1118. It is clear from reading *Board of County Commissioners* that it was not intended to overrule *Pembaur*. In the instant case, the sheriff was the "government's authorized decision-maker" who terminated the plaintiff. If the jury finds that Sheriff Guider's decision was unconstitutional, that would be sufficient to establish the liability of the county.

VII.

Defendants' Claim that Plaintiff Declined to Utilize Existing and Adequate State Remedies

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that the plaintiff, a prison inmate, did not have a valid constitutional claim for deprivation of due process because the state provided a means by which he could receive redress for his deprivation. *Id.* at 544. However, *Parratt* is inapplicable in this case. Plaintiff has not asserted a procedural due process claim because she concedes she had no property interest in her job to which procedural due process might apply. *Parratt* has no applicability in the First Amendment context.

VIII.

Qualified Immunity

Defendant Guider, in his individual capacity, argues that when the plaintiff was terminated in July 1995, the law was not clearly established "that jailers or deputy sheriffs could not be dismissed for political affiliation" and that under those

circumstances plaintiff's termination was "objectively reasonable."

The doctrine of qualified immunity recognizes that government officials need to be able to carry out their duties without fear of harassing litigation and that they can do so "only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified law suits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Therefore, when government officials perform discretionary functions, they "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The focus in determining whether an official is entitled to qualified immunity is on the objective legal reasonableness of the official's actions in light of clearly established law. *Harlow*, 457 U.S. at 818. The court's focus is on whether, at the time the defendant acted, the rights asserted were clearly established by decisions of the Supreme Court or of the Sixth Circuit Court of Appeals. *Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir. 1987). "[Defendant] has qualified immunity unless plaintiff's 'rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from such conduct.' " *Ramirez v. Webb*, 835 F.2d at 1156 (quoting *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). The Supreme Court has noted:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly

> established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, __ U.S. __, 107 S.Ct. 3034, 3039 (citation omitted).

Although qualified immunity is purely a legal question to be decided by the court, where intent or motive is an element of the violation and there is a dispute of fact surrounding it, the issue must be submitted to the jury. *Brandenburg v. Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989).

With respect to a case involving the *Branti* exception and the specific job duties of the job in question, if the factual record is unclear or underdeveloped, granting qualified immunity at the summary judgment stage is not appropriate and should be denied. *McCloud*, 97 F.3d at 1558-62. In *McCloud*, the Sixth Circuit rejected the notion that there must be a separate patronage dismissal decision by the Supreme Court or the Sixth Circuit involving a particular position before qualified immunity can be denied in such a case. At this point it is certainly not clear that plaintiff's position as jailer falls within one of the four *Branti* exceptions which are outlined in *McCloud*. *See McCloud*, 97 F.3d at 1557-58.

This is not to say that qualified immunity might not become available with respect to plaintiff's freedom of association claim once the facts surrounding the type of job she possessed are developed at any time up to or including the conclusion of trial. However, at this point, defendant Guider is not entitled to summary judgment on the basis of qualified immunity if the proof should turn out that plaintiff's position as a jailer was one in which she had no discretionary authority. It has been clear since at least 1990 that an applicant for the position of prison guard fell outside the *Branti* exception and was entitled to First Amendment protections. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-79 (1990). Accordingly, defendant Guider is not entitled to summary judgment on the basis of qualified immunity.

IX.

Conclusion

In light of the foregoing, defendants' motion for summary judgment [Court File #13] will be granted in part and denied in part. With respect to plaintiff's claim that defendants violated her familial association rights, the motion will be granted. In all other respects, the motion will be denied. Plaintiff's motion to allow filing of brief in excess of 25 pages [Court File #21] will be granted.

Order accordingly.

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-659

WANDA L. SOWARDS,

Plaintiff

v.

LOUDON COUNTY, *et al.*,

Defendants

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that defendants' motion for summary judgment [Court File #13] is GRANTED IN PART and DENIED IN PART. With regard to plaintiff's familial association claim, the motion is GRANTED. In all other respects, the motion is DENIED. Plaintiff's motion to allow filing of brief in excess of 25 pages [Court File #21] is GRANTED.

ENTER:

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 24, 2000

98-6768

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WANDA L. SOWARDS,

Plaintiff-Appellant,

v.

LOUDON COUNTY, TENNESSEE, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: JONES, MOORE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk